Office Supreme Court, U.S.
FILED
DEC 17 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 196

No. 679

JAMES D'ANTONIO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALAN MILES RUBEN
Suite 212
1212 Chestnut Street
Philadelphia, Pa. 19107
Of counsel

JOYCE ULLMAN
Suite 1200
1528 Walnut Street
Philadelphia, Pa. 19102
Attorney for Petitioner
(pending admission to the bar of the Supreme Court of the United States)

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA 19104

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Federal Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	10
Appendix "A"—Opinion of the U. S. Court of Appeals	10
Appendix "B"—Statutes Involved	12

Cases Cited

Barrett v. United States, 5th C. C. A., 322 F. 2d 292 (1963)	9
Bozza v. U. S., 330 U. S. 160, 67 S. Ct. 645, 91 L. Ed. 818	8
Jehl v. U. S., 127 F. 2d 585 (1942)	8
U. S. v. Silva, 109 F. 2d 531 (1942)	8
Vick v. U. S., 216 F. 2d 228 (1954)	8

Statutory and Other Authorities

Title 26 U.S.C.A. Section 5601	8
Title 26 U.S.C.A. Section 5601(b)	8, 9, 10
S. Rep., No. 2090, 85th Cong., 2d Sess. (1958)	8, 9
3 U.S. Code Cong. & Adm. News 4395, 4580 (1958)	8
United States Constitution, 5th Amendment	9

IN THE

Supreme Court of the United States

October Term, 196

No.

JAMES D'ANTONIO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, JAMES D'ANTONIO, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case.

OPINIONS BELOW

There is no opinion in the District Court.

The opinion of the Circuit Court of Appeals, printed in Appendix "A," page 10, infra, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered October 25, 1963.

The Order denying Petitioner's Motion for Rehearing was entered by the Court of Appeals on November 19, 1963.

Jurisdiction to issue the Writ rests on Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

A. When the Government referred to and used a diagram drawn on a blackboard during its entire case, and was allowed to have the blackboard admitted into evidence; and where the diagram was admittedly not accurate, and not drawn to scale, and was used not only to illustrate the area but to prove important issues of facts in this case, was this so prejudicial to petitioner to have deprived him of his constitutional right to a fair trial.

B. Was there sufficient evidence presented by the Government to prove the charges contained in the Indictment—possession and control of a still, being engaged in the business of a distiller, and making and fermenting mash fit for distillation, and conspiracy to do same, or should the motion made by petitioner for a judgment of acquittal, at the conclusion of the Government's case and at the conclusion of the defense, have been sustained.

C. Is the conviction of defendant void in that he was forced to testify in his own behalf by reason of Section 5601 (b) of Title 26, U.S.C.A., and is this statute unconstitutional in that it places a burden upon the defendant to testify in his own behalf and therefore is in direct contradiction to the 5th Amendment of the Constitution that no person shall be compelled to be a witness against himself.

FEDERAL STATUTES INVOLVED

Title 26 USCA 5601; Title 26 USCA 5606; Title 26 USCA 5607; Title 26 USCA 5601(a), (1958 amendment); Title 26 USCA 5601(b) (1958 amendment)—see Appendix "B," page 12, infra.

STATEMENT OF THE CASE

Petitioner was convicted on January 8, 1962 and sentenced on April 16, 1962 (Honorable Arthur S. Lane) in the United States District Court for the District of New Jersey under an indictment charging the first count a conspiracy between Petitioner, John J. Maciejewski, also known as John Russel, Daniel Angelo Lorenzo, and Samuel Joseph Guagliardo, also known as Sam Willardo, to engage in the business of a distiller, without having bond as required by law, to possess and have under their control a still and distilling apparatus, without registering same as required by law, to make and ferment mash fit for distillation, and for the production of spirits and alcohol on a premises other than a distillery authorized by law. The indictment also charged the Petitioner, together with those mentioned above, in Counts two, three, and four, the act of carrying on the business of a distiller without a bond as required by law, having in their possession a still not registered as required by law, and making and fermenting mash on a premises not authorized by law. The trials of the other named defendants were held at a different time. They had already pleaded guilty and were serving their sentences.

The period of time of the alleged unlawful act covered by count one in the indictment was from October 10, 1958 to May 18, 1959; the period of time of the alleged unlawful acts covered by Counts 2, 3, and 4 of the indictment was from March 18, 1959, to May 18, 1959.

The search warrant obtained by the Federal Officers in this case was for a certain barn and other outer buildings in close proximity to the barn building. This particular area

described in the search warrant was completely enclosed by fencing, save for means of ingress and egress.

At the trial of the case the Government admitted testimony to show that this small area described in the search warrant was located on a farm property owned by the petitioner; that within this barn in this area was a still; that on May 16, 1959, and May 17, 1959, surveillance was made of the area by federal agents; that the raid took place on May 18, 1959 at approximately 7:30 A. M.

There was placed before the jury at the start of the Government's case a blackboard upon which was drawn a diagram of the area of the raid; in addition, it also showed the farm house in which the petitioner lived. Petitioner objected to this use by the Government, and to its final admission into evidence on the grounds that it was not drawn to scale, and since it was being used to demonstrate distances, it would be prejudicial to him, and misleading to the jury. In addition, the relative distances of the various buildings were not accurate and there were roads leading to the still area not put in the diagram. The federal agent admitted drawing the diagram just five minutes before the trial from a piece of paper upon which was a sketch which he had made at the scene, also not drawn to scale. The objection was overruled and the diagram was before the jury during the entire trial, and at the end of the Government's case, admitted into evidence.

The only evidence presented by the Government which directly concerned the petitioner was that, on the morning in question a co-defendant one Daniel Lorenzo drove up to the barn area about 7 A. M., alone in a truck; that while attempting to back up the truck at the gate surrounding the barn area, he knocked down the gate post, then proceeded to back up the truck to the barn door; that he got out of the truck, went out of the barn yard gate, and walked in the direction of the farm house; that about twenty minutes later, he was observed, together with petitioner, walking back to the barn area; that they paused at the gate, at which Lorenzo showed him the damage, and both walked

together to where the truck was; at that point one of the agents testified he saw Lorenzo jump on top of the truck, pull back the tarpaulin, and hand a bag of sugar to a man standing behind the truck whom he claims was petitioner, and that he saw this man carry the sugar into the barn. At this point the raid was made by several agents converging upon the barn area from all sides of the barnyard. Arrested, together with petitioner and Lorenzo, was a John J. Maciejewski; Maciejewski was found in the barn. Petitioner was found outside the barn, past the truck, "running from the barn". There was testimony that petitioner was not at any time before, ever seen at or near the area, or even on the entire farm.

Other evidence introduced by the Government showed that petitioner had purchased the farm in January, 1959, had leased this particular area to a Gene Bertolli in April of 1959, and the lease was introduced into evidence.

Additional evidence introduced by the Government (over objection of petitioner) included a witness from Philadelphia who testified that, some time in November 1958 the petitioner had rented a room in her rooming house and that he received a driver's license there under the name of James Pietra; that some person (not identified) rented a welding machine in March of 1959, using the driver's license of James Pietra as identification; that electricity ran from petitioner's house to the barn; and that petitioner paid the electric bill.

The overt act No. 1 in Count No. 1 of indictment was never proved. At the close of the Government's case, petitioner's Motion for Judgment of Acquittal was denied.

In defense, petitioner stated that he came to the barn area that morning with Daniel Lorenzo because he was angry that Lorenzo should have broken the gate post, and he wanted to see it; that while examining the post Lorenzo told him it happened because the mirror on the truck was broken; that he walked to the truck to see the mirror; and that as he was "walking" away out of the area, the Federal Agents declared their raid. He testified he did not know there was a still on his property, that he never conspired with anyone for that purpose; but that he was getting suspicious and angry

because none of the rent had been paid; that he had already asked them to leave, just several days before this date; that before May 18 and from the time he leased that area, he had never gone up there in the daytime.

A co-defendant, John J. Maciejewski, testified that he was in the barn that morning, that he saw the truck crash the gate; that he heard petitioner raise heck with Lorenzo for crashing the gate, that he was the one behind the truck when Lorenzo started unloading, and that petitioner had started away from the area when the unloading started; and that Lorenzo handed him (Maciejewski) one bag of sugar which he took inside the building.

At the close of the defendant's case, petitioner moved for a judgment of acquittal, which was denied.

REASONS FOR GRANTING THE WRIT

A. With reference to the question of the admissibility into evidence of the blackboard containing the diagram:

(1) The holding of the Third Circuit, in affirming the admissibility of the blackboard into evidence and in approving of its constant use during the presentation of the Government's case was an improper sanction of the conduct of the lower court.

It is vital to the fair administration of criminal justice in the federal courts that demonstrative evidence be accurate and true. On the other hand, where the trial court permits constant reference to and admission into evidence, evidence which is not accurate and not true, and when its effect must be to distort the facts in the minds of the jurors, a defendant is not given a fair trial to which he is entitled.

The diagram in this case is admittedly not drawn to scale and admittedly not accurate. On the other hand it was drawn by a government witness just five minutes before the trial from a sketch made by the witness at the still area, also not drawn to scale. It contained not only the area described in the search warrant, but the area outside that

described in the search warrant, including petitioner's home and the area surrounding his home;

The diagram here was used for more than a visual aid to the jury; it was here used as substantive evidence in the case.

The two most important issues before the jury in the case were whether or not it was the petitioner whom the federal agent saw being handed a bag of sugar behind the truck; and second, whether or not petitioner had knowledge of the existence of the still operator, and had control of it.

The federal agent referred to the diagram to show where he was hiding when he saw the man being handed a bag of sugar.

Exact distances and relationships of one place drawn in the diagram to another had a direct bearing on the substantive issues in the case.

The question presented here as to what type of diagrams and demonstrative evidence the government can produce as evidence at a trial such as the one sought here to be reviewed, should be reviewed by this Court as it involves federal practice and procedure and the fair administration of justice in the federal courts.

(2) The standard for admissibility and use of diagrams and demonstrative evidence in federal criminal cases has never been reviewed nor set forth by this Court.

B. With reference to the question of whether or not sufficient evidence was presented by the Government to substantiate the charges in the indictment:

1. The decision of the court below is believed to be erroneous and in conflict with applicable decisions of this Court and with the Circuit Court of Appeals in other jurisdictions.

2. The conflict of decisions from the various circuit courts represents a need for further clarification of the applicable statutes as they refer to the quantity of evidence and the type of evidence necessary to support the allegation and violations of the statutes presented here.

3. The changes made by the legislature in 1958 to Section 5601 of Title 26 U.S.C.A. were done for the purpose of overcoming the effect of the *Bozza* case. Is it therefore necessary under the new statute to have the same type of evidence to sustain a conviction as stated in the *Bozza* case.

In *Bozza v. U.S.* (330 U.S. 160, 67 S. Ct. 645, 91 L. Ed 818 (1947)), this Court pointed out that the revenue statutes have broken down the various steps and phases of the continuous illicit distilling business and made each of them a separate offense, and that consequently the testimony to prove each offense must point to the conduct within its distinct narrow margins.

However, in S. Rep., No. 2090 85th Congress, 2d Sess. (1958); 3 U.S. Code Cong. & Adm. News 4395, 4580 (1958) it stated:

"In the Bozza case the Supreme Court took the position that to sustain conviction, the testimony must point directly to conduct within the narrow margins which the statute alone defines. These new provisions are designed to avoid the effect of that holding as to future violations."

The 9th Circuit in *Jehl v. U.S.*, 127 F. 2d 585 (1942) has held that there must be evidence connecting what apparatus was sold to the defendant to the actual use of it in the operation of the still. This is in conflict with this circuit in which such evidence was considered sufficient proof.

In the 5th Circuit, in *Vick v. U.S.*, 216 F. 2d 228 (1954) it was held that defendant must be doing some actual work in the distillery to be found guilty. This is in conflict with the decision of this circuit.

In the 2nd Circuit, in *U.S. v. Silva*, 109 F. 2d 531 (1942) it was held that mere knowledge does not make one a conspirator. This is contrary to the holding in this circuit.

C. With reference to the constitutionality of Section 5601(b) Title 26, U.S.C.A.:

This statute provides that the presence of the defendant at, near or in the still is sufficient evidence to authorize

a conviction of possession of a still, engaging in the business of a distiller and making and fermenting mash, unless the defendant explains such presence to the satisfaction of the jury. This, therefore, creates a presumption in favor of the Government, and also places a burden upon the defendant to come forth and explain away his presence. This violates his right to remain silent and is therefore a violation of the 5th amendment of the United States Constitution.

By providing in the statute itself that the defendant must explain his presence, the Legislature has created a presumption and a rule of evidence which violates a rule which has been expressly enshrined in the Constitution, that a defendant need not be a witness against himself.

The purpose of this legislation was to overcome the difficulty of obtaining a conviction of a person discovered at or near a still. (Report of the Senate Finance Committee. S. Rep. No. 2090, 85th Congress, 2d Sess. (1958).)

The Court of Appeals for the 5th Circuit, in *Barrett v. U. S.*, 322 F. 2d 292, handed down a decision in September of 1963, declaring this Section 5601(b) unconstitutional as a violation of the due process clause of the 5th amendment, and stated at page 296,

"When, however, the legal effect of the rule is to allow an accused person to be found guilty solely on the basis of a presumption; unless he comes forward with evidence to overcome the non-existence of the presumed fact, the practical effect is to coerce the accused into taking the stand in spite of the Fifth Amendment provision that 'no person shall be compelled in any criminal case to be a witness against himself'."

This issue is of importance to every defendant who must answer to these specific charges, for regardless of his constitutional right not to testify, he must take the witness stand.

The constitutionality of the statutory presumptions, and the constitutionality of the statutory duty imposed upon the defendant if he wishes to overcome the presumption

which Section 5601(b) establishes, therefore raises an important issue which should be reviewed by this Court.

CONCLUSION

WHEREFORE, Petitioner respectfully prays this Honorable Court to issue its Writ of Certiorari to the United States Court of Appeals for the Third Circuit, commanding that the record of this cause be certified and delivered to the Supreme Court of the United States for review of the questions presented in this petition.

Respectfully submitted,

ALAN MILES RUBEN
Of counsel

JOYCE ULLMAN
Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,114

UNITED STATES OF AMERICA

v.

JAMES D'ANTONIO, also known as JAMES PIETRA; DANIEL ANGELO LORENZA; JOHN J. MACIEJEWSKI, also known as JOHN RUSSEL; SAMUEL JOSEPH GUAGLIARDO, also known as SAM WILLARDO

JAMES D'ANTONIO, *Appellant.*

On Appeal from the United States District Court for the District of New Jersey

---

Argued October 15, 1963

Before McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed October 25, 1963)

PER CURIAM.

Appellant was convicted of being a party to a conspiracy to violate the internal revenue laws in regard to alcohol, 18 U.S.C. §371; of carrying on the business of a distiller without having given bond, 26 U.S.C. §5601; of possession of an unregistered still, 26 U.S.C. §5606 and of making and fermenting mash fit for distillation, 26 U.S.C. §5608.

It is contended primarily on his behalf that a blackboard diagram of the farm area that contained, inter alia, the still, which was drawn and used by an Alcohol and Tobacco Tax Unit agent for the purpose of illustrating his testimony, should not have been admitted into evidence. The objection is that the diagram was not drawn to scale and therefore tended to mislead the jury. There was no assertion at any time that the sketch was drawn to scale. Admittedly it was not. However, the various distances marked thereon were those measurements made by the witness while he was present at the locality represented in the diagram. Clearly the latter comes within "The general rule . . . that an illustrative diagram intended to portray existing facts may be employed if it is a correct portrayal of existing facts." Grayson v. Williams, 256 F.2d 61, 63 (10 Cir. 1958); cf. Thomas v. Conemaugh Black Tick Railroad, 133 F.Supp. 533, 541, aff'd other grounds, 234 F.2d 429 (3 Cir. 1956).

The remaining objection is that there was not sufficient proof offered on behalf of the Government to warrant the case being presented to the jury for decision. From our own independent examination of the evidence we are satisfied that the case was properly submitted to the jury on all four counts.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B"

Title 26 USCA 5601. Penalty and forfeiture for possession of unregistered still or distilling apparatus

Every still or distilling apparatus not registered as required by section 5174, together with all personal property in the possession or custody, or under the control of the person required by section 5174 to register the still or distilling apparatus, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5174, shall pay a penalty of $500, and shall be fined not more than $1,000, and imprisoned not more than 2 years. Aug. 16, 1954, 9:45 A. M. E.D.T., c.736, 68A Stat. 683.

Title 26 USCA 5606. Penalty and forfeiture for distilling without giving bond

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not more than $5,000 and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a dis-

tiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States. Aug. 16, 1954, 9:45 A. M. E.D.T., c.736, 68A Stat. 684.

Title 26 USCA 5608. Penalty for making or fermenting mash on unauthorized premises; illegal use of spirits; unlawful removal of vinegar; etc.

(a) *Violation of Section 5216.* Every person who violates any provision of Section 5216 shall be fined for each offense not more than $5,000 and be imprisoned not more than 2 years.

Title 26 U.S.C.A. 5601. (applicable statutes since Sept. 2, 1958, replacing similar provisions in former section 5601, 5606, and 5608)

Criminal Penalties

(a) *Offenses*—any person who—

(1) has in his possession or custody or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a) or

Failure of a distiller or rectifier to file application—engages in the business of a distiller or rectifier without having filed application for and received notice of registration . . .

(7) *Unlawful Production, removal or use of material fit for production of distilled spirits*—except as otherwise provided in this chapter, makes or ferments mash, wort or

wash, fit for distillation or for the production of distilled spirits, in any building or in any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits . . . or

(8) *Unlawful production of distilled spirits*, not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort or wash or other material . . . shall be fined not more than $10,000 or imprisoned not more than five years or both, for each such offense.

Title 26 U.S.C.A. 5601 (b). Presumptions—

(1) *Unregistered stills*—Whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or, of the court when tried without a jury) . . .

(3) *Unlawful production, removal or use of material fit for production of distilled spirits*—Whenever on trial for violation of subsection (a) (7) the defendant is shown to have been at the place in the building or on the premises where such mash, wort, or wash was there possessed, such presence of the defendant shall be deemed sufficient to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without a jury).

(4) *Unlawful Production of distilled spirits*—Whenever on trial for violation of subsection (a) (8), the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court without a jury).